Supreme Court, U.S.
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No. 96-1012

In The

Supreme Court of the United States

October Term, 1996

VELMA E. CARR,

Petitioner,

vs.

JAMES F. RUNYAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS' LINDA K. BLOOM AND TIM BERRY

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APP

QUESTIONS PRESENTED

I. Whether the court's determination that a settlement had been reached and to enforce the settlement was reasonable and not an abuse of discretion.

II. The Respondents note that the Petitioner has not previously raised below her Petitioner's Question Presented for Review No. "A".

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The Respondent Linda K. Bloom, individually and as Auditor of Allen County, Indiana, and Tim Berry, individually and as Treasurer of Allen County, Indiana ("Allen County Respondents") request that the Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Seventh Circuit. The Court of Appeals opinion is recorded at 89 F.3d 327 (7th Cir. 1996).

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition

This appeal arises from the district court's grant of the Respondents' motion to enforce a settlement agreement and the Seventh Circuit's affirmance. In the underlying action, the Petitioner Velma E. Carr ("Carr") sought to void a tax sale, to void and terminate a contract for sale of real estate, and damages under 42 U.S.C. § 1983. The district court ordered and the parties participated in mediation. As a result of the mediation, the parties reached a settlement.

However, Carr refused to fulfill the terms of the settlement agreement and filed a motion to begin a trial schedule. Subsequently, the Respondents filed a motion to enforce the settlement agreement. (R. 29.) Following an evidentiary hearing, the district court granted the motion and dismissed this action pursuant to the settlement. (R. 36.) Carr then filed a motion for new trial and motion to set aside judgment, which the district court denied. (R. 42, A-12.)

On appeal, the United States Court of Appeals for the Seventh Circuit held that Carr's representative at the mediation had at least apparent authority to settle the case and to bind Carr. The Court of Appeals further ruled that, although a continuance of the motion to enforce the settlement would have been

advisable, Carr and her family declined a continuance more than once. The district court, therefore, did not commit reversible error by failing to grant a continuance *sua sponte*. The Court of Appeals affirmed the judgment of the district court.

Carr has argued that a settlement was not reached since Carr's representatives at the mediation did not have authority to settle the action on her behalf. Additionally, Carr has claimed that the district court erred by not — on its own motion and even though Carr did not accept the district court's offers of a continuance — continuing the hearing to enforce the settlement and permitting her to retain alternative counsel.

The Respondents contend that Carr's representative at the mediation had authority to settle the case on Carr's behalf, and the parties reached a settlement. Additionally, the district court provided Carr with ample opportunities to retain alternative counsel, and Carr therefore was not entitled to a continuance of the hearing to enforce the settlement agreement.

B. The Mediation

At the pretrial conference, the district court ordered the matter referred to mediation. (R. 17.) The parties agreed to the appointment of John C. Theisen ("Theisen") of Fort Wayne, Indiana, as the mediator. The order to mediate provided that "counsel, the parties, and the appropriate officers or representatives of the parties (to include insurance company representatives where appropriate) who have full settlement authority shall be present in person at the [mediation/evaluation conference] unless their personal presence is excused by leave of court in which event they shall be continuously and immediately available for consultation by telephone with their respective counsel, or the mediator[s]." (R. 25 at 2.) Additionally, the order to mediate required that "[t]he representatives in

attendance should have the same level of responsibility and authority as one who would ordinarily be sent to a settlement conference conducted by the court." (R. 25 at 2, n. 2.)

The mediation was held on October 25, 1994, with Theisen as the mediator. Carr was not present in person at the mediation. Carr was represented by Michael D. Harmeyer, her then counsel (Hearing Transcript, pp. 25, 42, 76.), and by her daughter Vivian Sarver ("Sarver") "to act in her behalf." (Hearing Transcript, pp. 25-28, 42-43.) Prior to the mediation, Harmeyer spoke with Carr by telephone in the presence of Sarver. (Hearing Transcript, pp. 25-26.) Carr told Harmeyer "that she would . . . go along with whatever [Sarver] want[ed] — [Sarver] agreed on." (Hearing Transcript, p. 7.) In essence, Carr recognized that Sarver was close to the litigation and that "she would leave it up to [Sarver]. . . ." (Hearing Transcript, p. 27.) Following his conversation with Carr, Harmeyer advised Sarver that she had authority to act on Carr's behalf at the mediation. (Hearing Transcript, p. 28.)

During the mediation, both Sarver and Harmeyer advised Theisen that Sarver was representing Carr. (Hearing Transcript, p. 43.) The mediation lasted approximately 6 1/2 hours. During the process, Sarver and Harmeyer made offers and counteroffers on behalf of Carr. (Hearing Transcript, pp. 43-45.)

Eventually, the Respondents made a collective settlement offer to pay $28,000 to Carr for the conveyance of any and all interest of Carr in the property at issue and to settle the litigation. Sarver rejected this offer. (Hearing Transcript, pp. 30, 45-46.) Sarver then asked Harmeyer what he recommended or suggested regarding settlement. Harmeyer recommended settlement in return for payment of $29,000 to Carr. Sarver authorized Harmeyer to make such a counter-offer. (Hearing Transcript, pp. 31, 34.) As a result, Harmeyer made an offer to accept

payment of $29,000 to Carr in return for the conveyance of her interest in the subject property to Respondent James F. Runyan and the settlement of any other actions against all parties. Sarver "asked [Harmeyer] what he recommended and that's what he recommended, then that's what we went with." (Hearing Transcript, p. 31.)

The final settlement offer made on Carr's behalf and accepted was for the Respondents collectively to pay $29,000 to Carr in return for the conveyance of her interest in the subject property to Respondent James F. Runyan and dismissal of all claims against all parties. (Hearing Transcript, pp. 45-47; Report of Mediator John C. Theisen filed October 28, 1994.)

There was no doubt in mediator Theisen's mind that the parties had reached a settlement of the action. (Hearing Transcript, p. 54.) Following acceptance by the Respondents of the $29,000 offer, Theisen met collectively with the parties to dictate onto tape the terms of the mediated settlement agreement so as to have a record of what was agreed upon in the mediation. Eventually, the tape was transcribed. All parties, including Sarver, were present during Theisen's dictation memorializing the terms of the mediated settlement agreement. (Hearing Transcript, pp. 49-50, 68.)

Theisen opened the recitation of terms by noting that an agreement had been reached and the terms of that Agreement. Theisen then asked all counsel whether his remarks accurately reflected the terms of the mediated settlement. All counsel, in the presence of their clients and representatives, agreed that the recited terms accurately reflected the mediated settlement. No clients or representatives voiced opposition or disagreement. Harmeyer specifically stated that he had spoken to his client and that the terms of the mediated settlement were acceptable to Carr. (Post-Mediation Transcript; Hearing Transcript, pp. 51-52.)

Subsequently, Theisen filed a Report of Mediator with the district court reporting the results of the mediation and the terms of the mediated settlement. After the mediation, Harmeyer also believed that the parties had reached a settlement of the action. (Hearing Transcript, pp. 77-76.) Indeed, Harmeyer prepared a Joint Stipulation for Dismissal with Prejudice to finalize the settlement. (Hearing Transcript, pp. 76-77, 80.)

C. Enforcing the Settlement

On December 19, 1994, Carr informed Harmeyer that she would not proceed with the settlement agreed to at the mediation. (Hearing Transcript, p. 14.) On December 20, 1994, Harmeyer, on Carr's behalf, filed a Motion for Order Amending Order for Pretrial Conference, Notice of Trial Setting and Order Controlling the Case, and for Order Resetting Dates and Deadlines Established in Docket Entry Following Preliminary Pretrial Conference. (R. 26.) The Respondents filed a motion to enforce the settlement agreement. (R. 29.) A hearing on the motion to enforce the settlement agreement was scheduled for and held on February 13, 1995, before the Honorable William C. Lee, Judge for the United States District Court for the Northern District of Indiana, Fort Wayne Division.

Immediately prior to the hearing, Harmeyer filed a motion to withdraw appearance. (R. 34.) Judge Lee took under advisement the motion to withdraw appearance until the issue of the settlement was resolved.

At the hearing, Sarver testified about the background of the underlying litigation. (Hearing Transcript, pp. 15-24.) Sarver had hired Harmeyer to represent her mother and had paid the legal fees. (Hearing Transcript, pp. 23-24.) Eventually, the complaint initiating this action was filed. Sarver also testified about her participation in the mediation. In sum, Sarver actively

participated in the mediation until a settlement was concluded. (Hearing Transcript, pp. 25-39.)

Following Sarver's testimony, Theisen testified about his role as mediator. Based on his participation in the mediation, Theisen had no doubt in his mind that Sarver had settlement authority on behalf of Carr at the mediation, and that the parties had reached a settlement. (Hearing Transcript, pp. 40-57.)

The court then permitted the testimony of Carr's son, Charles Edward Carr ("Charles"). Although Charles was not present at the mediation, Judge Lee permitted Charles to testify about his concerns. (Hearing Transcript, pp. 8, 59-74.) During Charles' testimony, Judge Lee asked at least twice whether Carr, Sarver or Charles desired additional time to retain alternative counsel. These offers were not accepted. (Hearing Transcript, pp. 63, 72-73.) Additionally, the court requested comments from anyone at least five times during the hearing. (Hearing Transcript, pp. 63, 67, 72, 73-74, 82.) Neither Carr nor a member of her family took these opportunities to request a continuance or alternative counsel.

Harmeyer testified about his participation and authority at the mediation. (Hearing Transcript, pp. 75-81.)

During the hearing, the court further elicited evidence from anyone who desired to testify. (Hearing Transcript, pp. 63, 67, 72, 73-74, 82.)

Following the hearing, the district court orally rendered its opinion. (Hearing Transcript, pp. 85-91.) In considering that evidence, the district court reached the conclusion that Sarver and Harmeyer had at least apparent authority, if not explicit actual authority, to settle the action at the mediation on behalf of Carr, and that such a settlement had been reached. (Hearing Transcript, p. 90.)

On February 23, 1995, Carr, by her present counsel, filed a Motion for New Trial pursuant to Trial Rule 59 and Motion to Set Aside Judgment pursuant to Trial Rule 60. (R. 26.) The district court denied Carr's Motion for a New Trial. (R. 42.)

The United States Court of Appeals for the Seventh Circuit affirmed the district court on appeal. (A-1.)

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER HAS ESTABLISHED NO COMPELLING REASONS PURSUANT TO SUP. CT. R. 10 OR OTHERWISE FOR REVIEW.

The Petitioner has set forth no compelling reasons to grant review on a Writ of Certiorari.

II.

THE PETITIONER HAS DEMONSTRATED NO SPLIT OF AUTHORITY REQUIRING RESOLUTION.

The Petitioner has made no showing that any United States Courts of Appeals or state high courts are divided on any of the issues raised. The Petitioner does not even allege a split of authority. The Allen County Respondents have not located or identified any United States Court of Appeals or state high court cases which suggest such a split. *See* Sup. Ct. R. 10(a), (b).

III.

THE PETITION PRESENTS NO QUESTIONS WHICH ARE IMPORTANT AND RECURRING.

The Petition for Writ of Certiorari does not present issues, questions or facts which are recurring or important beyond the scope of this case. The legal questions presented by the petition are so bounded by particular facts that the questions have minimal importance "beyond the academic or episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). *See also* Sup. Ct. R. 10(c). The Petitioner's asserted errors really consist exclusively of allegedly erroneous fact-finding, application of state law to facts in dispute, and prudential matters.

In her Questions Presented For Review No. "A," the Petitioner does present a question of some potential general interest and application; namely, whether the handling of this case by the district court was so flawed that it abrogated minimal procedural safeguards and deprived Carr of her property without due process, thereby requiring this Court to step in and assure a valid alternative dispute resolution process. Although alternative dispute resolution methods in the federal courts must conform to constitutional procedural standards, close attention to the issue presented reveals that this issue, too, is strictly bounded by the unique and unusual facts of the case at hand. Short of inviting a review of and commentary upon the alternative dispute resolution local rules of numerous federal district courts, the review Petitioner seeks would involve the precise and fact-bound analysis of how alternative dispute resolution rules were applied *in this case.*

IV.

PETITIONER HAS NEVER PREVIOUSLY RAISED THE DUE PROCESS ISSUE.

The Petitioner has not previously raised the Fourteenth Amendment due process issue. If the Petitioner truly contends through Question "A" that the United States Court of Appeals for the Seventh Circuit and the district court violated the Fourteenth Amendment to the United States Constitution, the Petitioner has failed to properly raise the issue previously. No lower court, therefore, has had the opportunity to consider and develop the issue and relevant facts.

V.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT.

The United States Court of Appeals for the Seventh Circuit properly determined this action, and did so overwhelmingly by applying well-settled principles of Indiana state law. The Court of Appeals spent considerable time reviewing the procedural history and facts of the case, then applied unremarkable general principles of Indiana agency and contract law.

A. Carr's Representatives Had Authority To Settle At Mediation.

The primary issue on appeal is whether the district court's determination that Carr's representatives had authority to settle the action on behalf of Carr at the mediation was reasonable. Based on the record, such a finding is not only reasonable but unavoidable.

Public policy favors out-of-court settlements. *Boettcher Sewer & Excavating Co., LTD. v. Midwest Operating Engineers Welfare Fund,* 803 F. Supp. 1420, 1425 (N.D. Ind. 1992). The existence of a settlement is governed by federal law. *Morgan v. South Bend Community School Corp.,* 797 F.2d 471, 474 (7th Cir. 1986). Actions that may be settled between litigants include civil rights claims. *Merritt v. Faulkner,* 823 F.2d 1150 (7th Cir. 1987); *Taylor v. Gordon Flesch Co., Inc.,* 793 F.2d 858 (7th Cir. 1986); *Glass v. Rock Island Refining Corp.,* 788 F.2d 450 (7th Cir. 1986); *Lyles v. Commercial Lovelace Motor Freight, Inc.,* 684 F.2d 501 (7th Cir. 1982).

A district court retains the inherent power to enforce settlement agreements reached in litigation before it, even when the agreements are oral rather than written. *Lyles,* 684 F.2d at 504. Whether the plaintiff knowingly and voluntarily agreed to settle her claims is a question of fact. *Glass,* 788 F.2d at 455.

To constitute an enforceable contract for settlement, there must exist an offer, acceptance and consideration. *Id.* A party to a settlement cannot void the agreement merely because she subsequently believes the settlement is insufficient. *Id.*

Carr has contended that neither her daughter Sarver nor her counsel Harmeyer had authority to enter into a settlement agreement on her behalf at the mediation. As a contract, the construction and enforcement of settlement agreements are governed by state law applicable to contracts generally. *Laserage Technology Corp. v. Laserage Laboratories, Inc.,* 972 F.2d 799, 802 (7th Cir. 1992). Whether Sarver or Harmeyer had authority to propose and enter into such an agreement on behalf of Carr therefore is a matter of Indiana law. The record and the law establish that Sarver and Harmeyer did have such authority.

Sarver was Carr's agent at the mediation and had authority to settle the dispute on Carr's behalf. An agent acts for her principal in the same manner as though the principal herself had acted. *Silverstein v. Central Furniture Co.*, 131 Ind. App. 170, 162 N.E. 2d 690-701 (1959). An agency relationship may be implied from the actions and circumstances of the parties. *Upchurch v. Henderson*, 505 N.E. 2d 455, 457 (Ind. Ct. App. 1987). Here, the actions and circumstances establish that Sarver and Harmeyer "were clothed with the apparent authority to settle this case on behalf of Mrs. Carr," and even had actual authority.

"Actual authority" is authority which a principal gives, either expressly or impliedly, to an agent. *Northern Assur. Co. of America v. Summers*, 17 F.3d 956, 960 (7th Cir. 1994). "Apparent authority" is authority which a third person reasonably believes an agent to possess because of some manifestation from the principal. *Western Assur. Co. Inc. v. Star Financial Bank of Indianapolis*, 3 F.3d 1129, 1132 n. 7 (7th Cir. 1993) (citing *Herald Telephone v. Fatouros*, 431 N.E. 2d 171, 175 (Ind. Ct. App. 1982)); *Warner v. Riddell Nat. Bank*, 482 N.E. 2d 772, 775 (Ind. Ct. App. 1985). "Where the principal places an agent in a situation where the agent may be presumed to have authority to act, his principal is estopped against a third party from denying the agent's apparent authority." *Ill. Conference of Teamsters Well Fund v. Mrowicki*, 44 F.3d 451, 463 (7th Cir. 1994) (citing *Bank of North Carolina, N.A. v. Rock Island Bank*, 630 F.2d 1243, 1251 (7th Cir. 1980)). Here, Carr placed Sarver and Harmeyer in a situation where it was reasonable and logically unavoidable for the Respondents and the mediator to presume they had authority to settle the case on her behalf.

Initially, Carr's own failure to attend the mediation put Sarver and Harmeyer in a situation where it would be presumed that they had authority to act on her behalf. The order to mediate required that a representative with full settlement authority be

present in person at the mediation. Additionally, the order to mediate required that "[t]he representatives in attendance should have the same level of responsibility and authority as one who would ordinarily be sent to a settlement conference conducted by the court." (R. 25.) Instead of attending herself, Carr chose to send Sarver as a representative necessarily possessing the same level of responsibility and authority as if Carr had been at the settlement conference.

Based on the circumstances surrounding the mediation, it is little wonder that the parties, Harmeyer and the mediator all believed that Carr's representatives at the mediation had authority to settle the matter. Even Sarver believed that she and Harmeyer had authority.

The failure of Carr to testify at the hearing on Respondents' motion to enforce the settlement agreement only reinforces the Respondents' position. During the hearing, the district court solicited evidence from anyone who desired to testify. Carr, however, chose not to speak despite every opportunity to testify or otherwise discuss this matter with the court. Carr did not take advantage of that opportunity. Instead, Carr remained silent and permitted Sarver to speak on her behalf — just as Carr had asked and permitted Sarver to speak on her behalf at the mediation. Carr's own actions at the hearing placed Sarver in a situation where, again, Sarver was presumed to have authority to act.

B. The District Court Reasonably Conducted The Motion Hearing.

The record does not support Carr's contention that the district court abused its discretion by failing to continue the hearing to enforce the settlement agreement. The record indicates that the district court inquired at least twice whether Carr desired additional time to retain alternative counsel. This offer was

declined both times. Additionally, the court requested comments from anyone at least five times during the hearing. (Hearing Transcript, pp. 63, 67, 72, 73-74, 82.) Neither Carr nor a member of her family took these opportunities to request a continuance or alternative counsel. Any alleged prejudice or error in this respect was solely the fault of Carr.

Based upon the deferential standard of review applicable to this matter, the clear-cut and long-settled nature of relevant Indiana case law, and the testimony-based nature of factual issues before the district court, the Court of Appeals clearly decided this case correctly.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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